

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CARL Z. GEE,

Petitioner,

DECISION AND ORDER

03-CV-6184L

v.

JAMES CONWAY,

Respondent.

Petitioner, Carl Z. Gee (“Gee”), filed this petition, *pro se*, pursuant to 28 U.S.C. § 2254, seeking to vacate his conviction for a robbery in the first degree. The petition was referred to United States Magistrate Judge Victor E. Bianchini pursuant to 28 U.S.C. § 636(b). After his review, Magistrate Judge Bianchini issued a thorough, detailed 17-page Report and Recommendation (Dkt. #22) recommending that the petition be dismissed. Gee duly filed objections (Dkt. #24) to that Report and Recommendation.

Magistrate Judge Bianchini discussed the facts relating to petitioner’s participation in a robbery at a gas station in Greece, New York on November 14, 1997. Magistrate Judge Bianchini set out the procedural history, the motions that were filed and other evidentiary matters relating to the trial.

Gee seeks relief on the grounds that both his trial and appellate counsel provided ineffective assistance of counsel. Magistrate Judge Bianchini discussed the standard for determining such claims under principles established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Gee must show that his lawyers' representation was not within the range expected of attorneys in criminal cases, and that there was a reasonable probability that, but for counsels' ineffectiveness, the result of the trial and appeal would have been different.

Magistrate Judge Bianchini discussed at length Gee's claims of ineffective representation by both his trial and appellate counsel. Magistrate Judge Bianchini found that none of the matters raised by Gee constituted ineffective assistance of counsel. The matters suggested simply do not rise to the level of ineffective assistance. To some extent, counsel's actions at trial may have involved tactical decisions, for example, declining to have Gee testify before the grand jury and this Court is in no position to second guess such a tactical decision. I have considered all the matters raised by Gee and the discussion of them by Magistrate Judge Bianchini, and I find no error or reason to modify the Magistrate Judge's decision on these points. The same can be said for the claims that appellate counsel erred for not pursuing the claims Gee has advanced about his trial counsel's deficiencies. In sum, Gee has failed to establish either prong of the two-prong test set forth in *Strickland* for establishing an ineffective assistance of counsel claim.


CONCLUSION

I accept and adopt the Report and Recommendation (Dkt. #22) of United States Magistrate Judge Victor E. Bianchini. I find no reason to alter, modify or reject that Report and

Recommendation. I accept it, deny the relief requested and DISMISS the petition for habeas corpus relief.

Finally, I decline to issue a certificate of appealability because Gee has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c).

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
October 14, 2009.